IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.7410 OF 2005.

1. Anil Champalal Shah,]
Adult, 42 years, Residing at]
Plot No.2, Vardhaman Nagar]
Racca Colony, Nashik]

2. Shri Vardhaman Jain]
Swatamber Murtipujak Sangh]
a registered public trust]
having its address at Plot]
No.1, Vardhman Nagar,]
Racca colony, Nashik]

3. Mrs.Vijaya Bhavarsingh Wagh]
Adult, residing at Plot]
No.3, Vardhaman Nagar]
Racca Colony, Nashik.]

4. Mahadev Ramchandra Wagh]
Adult, residing at Plot]
No.4, Vardhman Nagar,]
Racca colony, Nashik]

5. Nathmal Manikchand Bedmutha]
Adult, residing at Plot]
Nos.5,19 & 20 Vardhman Nagar]
Racca colony, Nashik]

6. Mohanlal Vijayraj Bramecha]
Adult, residing at Plot]
No.6, Vardhman Nagar,]
Racca colony, Nashik]

7. Bhojraj Vijajraj Bramecha]
Adult, residing at Plot]
No.7, Vardhman Nagar,]
Racca colony, Nashik]

8. Anant Navmal Sabdra]
Adult, residing at Plot]
No.8, Vardhman Nagar,]
Racca colony, Nashik]

9. Shailesh Ramniklal Shah]
Adult, residing at Plot]

No.9, Vardhman Nagar,]
Racca colony, Nashik]

10. Paresh Javaharlal Shah]
Adult, residing at Plot]
No.10, Vardhman Nagar,]
Racca colony, Nashik]

11. Anil Jamnadas Ahuja,]
Adult, residing at Plot]
No.11, Vardhman Nagar,]
Racca colony, Nashik]

12. Jayant Narayan Wani]
Adult, residing at Plot]
No.12, Vardhman Nagar,]
Racca colony, Nashik]

13. Rahit Manilal Shah]
Adult, residing at Plot]
No.13, Vardhman Nagar,]
Racca colony, Nashik]

14. Rajendra Chinubhai Shah]
Adult, residing at Plot]
No.14, Vardhman Nagar,]
Racca colony, Nashik]

15. Vaishak Dushant Naik]
Adult, residing at Plot]
No.15, Vardhman Nagar,]
Racca colony, Nashik]

16. Sau.Rekha Kanhailal Manwani]
Adult, residing at Plot]
Nos.16 & 17, Vardhman Nagar,]
Racca colony, Nashik]

17. Dilip Champalal Shah]
Adult, residing at Plot]
No.18, Vardhman Nagar,]
Racca colony, Nashik].. Petitioners.

versus

1. Nashik Municipal Corporation]
having its office at Rajiv]
Gandhi Bhavan, Sharanpur]
Road, Nashik.]

2. The Commissioner,]

Nashik Municipal Corporation]
having his office at Rajiv]
Gandhi Bhavan, Sharanpur]
Road, Nashik]

3. The State of Maharashtra].. Respondents.

Shri R.D.Soni i/by M/s.Ram & Co., Advocate, for the Petitioners.

Mrs.M.P.Thakur, AGP, for the Respondents.

CORAM : R.M.S.KHANDEPARKAR & NARESH H. PATIL, JJ.

DATED : 31st AUGUST 2006.

ORAL JUDGMENT [PER R.M.S.KHANDEPARKAR,J.]

1. The petitioners challenge an action on the part of the respondents in dealing with the plot of land which was reserved to be open space and which is now sought to be utilised for the construction activities.

2. The facts relevant for the decision are that, pursuant to the agreement entered into with the owners of the land bearing Survey No.648, final plot No.311A and 311 (part) admeasuring about 2 Hectars and 52 Ares i.e. 25,200 sq.mtrs situated at Nashik, the said plot was sought to be developed by M/s.Viraj Estate

Pvt.Ltd. - the Developers after obtaining necessary sanction from the concerned authorities including Respondent No.1 - Corporation. For the purpose of development, the land was subdivided into several plots or different sizes and therefrom 20 plots were purchased by the petitioners in the regular course of their business by duly registered sale deeds. According to the final lay-out of the development plan, sanctioned by Respondent No.1 on 29.11.1999, the land was subdivided into 20 plots with an open space admeasuring 1143.65 sq.meters. The open space was essentially by way of amenities to the plot holders and formed part of the scheme under which the land was sought to be developed duly sanctioned by the corporation. In terms of various conditions laid down for sanction of development of the land by Respondent No.1, the developers had handed over the possession of the open space as well as the land utilised by internal roads to the Respondent No.1 for proper maintenance thereof. Out of the total area of 11424 sq.meters, area of 400 sq.meters is reserved for an Art Gallery in terms of town planning reservation; area of 3500 sq.meters was for a

primary school; and area of 4800 sq.meters was for a garden.

3. It is the case of the petitioners that the area of 4800 sq.mtrs. reserved for the garden in the development plan is sought to be utilised for the construction of tenements for housing of the municipal persons thereby depriving the rights of the occupants of the plots who utilised the said area as garden amenities attached to the said development scheme under the letter dated 25th August 2005. The petitioners sought permission of the respondent-corporation to develop the open space as garden for the benefit of the residents of the said plots. Alternatively, it was also requested to the corporation to develop the said plot accordingly as the garden. In spite of the same, the corporation appears to be interested in utilising the said area for the purpose of construction activities and hence this petition.

4. It is the case of the respondents, on the other hand, that the land in question having been handed over to the respondents in terms of

the permission granted for the development of the area, the corporation is entitled to utilise the same without violating the planning regulations and construction of the community hall which is proposed to be constructed in the said area, in no way, violates any of rules relating to the reservation of the land for utilisation for the benefit of the occupants of the plot around the open space.

5. Mr.Soni, the learned advocate appearing for the petitioners, drawing the attention to the decision of the Apex Court in the matter of **Pt.Chet Ram Vashist (dead) by L.Rs. v/s. Municipal Corporation of Delhi** reported in **(AIR 1995 SC 430)**, submitted that merely because for proper maintenance the possession of the open space is handed over in terms of the requirement of the permission granted for development with the corporation, it does not amount to create interest in favour of the corporation in the said land and the land continuous to be in the ownership of the said plot holders unless it is duly acquired by the corporation and, the corporation cannot utilise it for its own benefit by denying the rights of the plot

holders to such land.

6. Mrs.Thakur, the learned AGP appearing for the respondents, on the other hand, submitted that the development permission granted specifically provided for handing over the possession and creation of interest in favour of the corporation in such open land and road, once development is permitted by the corporation in respect of any land sought to be developed and accordingly the possession of the land was handed over to the corporation. The corporation is empowered to construct the community hall which ultimately will be of the benefit to all the plot holders and such construction in no way will change the nature of the land for being used for entertainment for such plot holders.

7. Short point for consideration which arises in the matter is, whether on the development permission being granted with the conditions incorporated therein, the development is subject to handing over possession of the open land which is forming part of development scheme to the corporation and on actual handing over the possession of such land to the

corporation, the interest therein would automatically stand transferred in favour of the corporation so as to empower the corporation to carry out the construction in such plot of land without any requirement of consent of the owners or plot holders in the development scheme.

8. Indeed, as rightly submitted by the learned advocate for the petitioners, the open space is the integral part of the total scheme of the development and the same is well settled by the decision of the Apex Court in the case of Pt.Chet Ram Vashist v/s. Municipal Corporation of Delhi (Supra). The Apex Court therein had clearly held as under :-

> "The lay-out plan referred to earlier in this section shall if so required by the Standing Committee, be prepared by a licensed town planner."
>
> None of its provisions entitled the Corporation to claim any right or interest in the property of the owner. Sub-section (3) empowers the Standing Committee to accord sanction to the lay-out plan on such conditions as it may think fit. The expression, 'sub conditions' has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. The Corporation has been given the right to examine that the lay-out plan is not contrary to any provision of

the Act or the rules framed by it. For instance a person submitting a lay out plan may be required to leave certain open space or he may be required that the length and width of the rooms shall not be less than a particular measurement or that a coloniser shall have to provide amenities and facilities to those who shall purchase land or building in its colony. But the power cannot be construed to mean that the Corporation in the exercise of placing restrictions or imposing conditions before sanctioning a lay-out plan can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favour of the Corporation free of cost. That would be contrary to the language used in the Section and violative of civil rights which vests in every owner to hold his land and transfer it in accordance with law. The resolution passed by the Corporation directing the appellant to transfer the space reserved for tube wells, school and park in its favour free of cost was depriving the owner of its property and vesting it in the Corporation against law. The finding of the High Court that such condition did not amount to transfer of ownership but it was only a transfer of the right of management cannot be accepted. The two rights, namely, of ownership and of management, are distinct and different rights. Once a vacant site is transferred in favour of another free of cost then the person transferring it ceases to be owner of it. Whereas in transfer of right of management the ownership continues with the person to whom the property belongs and the local authority only gets right to manage it. But the conditions imposed by the standing Committee clearly meant to transfer the ownership in favour of the Corporation. The Corporation as a custodian of civil amenities and services may claim and that would be proper as well, to permit the Corporation to regulate, manage, supervise and look after such amenities but whether such a

> provision can entitle a Corporation to claim that such property should be transferred to it free of cost appears to be fraught with insurmountable difficulties. The law does not appear to be in favour of the Corporation. Public purpose is, no doubt, a very important consideration and private interest has to be sacrificed for the welfare of the society. But when the appellant was willing to reserve the two plots for park and school then he was not acting against public interest. This cannot be stretched to create a right and title in favour of the a local body which utmost may be entitled to manage and supervise only.

Apex Court in the said decision had clearly held that though the restrictions are imposed upon the use of the such open land by the owners of the land and merely because the possession thereof is stated to have been handed over to the corporation for the maintenance, the corporation would merely act as a trustee without creating any interest in the said land and the land would continue to be in the ownership of the owners of the land or plot holders as the case may be and, in case the corporation wants to carry on construction activities in such land, the corporation will have to acquire the land by following due process of law. Merely because the corporation has granted permission for development of certain area and the letter granting such

permission had imposed conditions about handing over the possession of the land meant for the roads and the open space that by itself will not be sufficient to conclude that the ownership of such land would stand transferred in favour of the corporation for transferring of ownership it has necessarily to be for valuable consideration. Valuable consideration cannot be any fanciful consideration. Merely because the corporation passed resolution about requirement of such land to be transferred to the ownership of the corporation for the grant of permission for development, that would not ipso facto result in transferring the ownership of land in favour of the corporation, for the purpose of transfer of ownership, due process of law and provisions of law relating to transfer of ownership will have to be complied with.

9. In the case in hand, undisputedly, apart from the conditions laid down for the permission for development, actually and factually no steps were taken by the corporation to acquire ownership right in the land in question. Being so, the corporation was not entitled to carry on construction activities in the land in question

as rightly submitted by the learned advocate for the petitioners.

10. It was sought to be contended that till this date the construction has reached the stage of plinth level, and for that purpose the corporation had incurred expenses of Rs.50,000/-. The expenditure incurred by the corporation in the land belonging to the petitioners cannot by itself create any right in favour of the corporation to contend that the corporation should be allowed to carry on construction activities in such land and if the corporation in high handed proceeds to carry out the construction activities in such land, it is the corporation itself to be blamed for its irresponsible acts. Undoubtedly, the corporation as a public body would be entitled to take appropriate steps to recover such amount from the person or persons responsible for such illegal acts, if it has resulted in loss to the corporation. But that will not enure to the benefit of the corporation to claim any ownership right in the land in question. The land in question continues to be in ownership of the plot holders of the land which has been

developed and is meant for benefit of the plot holders . Undoubtedly, the plot holders if so desire and if it is permissible under the planning rules can carry out necessary construction in such land subject to rules and regulations applicable for such construction.

11. For the reasons stated above, therefore, the petition succeeds. The impugned action on the part of the respondents regarding the construction of community hall in the land in question is hereby quashed and set aside. The respondents are hereby restrained from carrying out any construction in the said plot without following due process of law. Rule is made absolute accordingly with no order as to costs.

[R.M.S.KHANDEPARKAR, J]

[NARESH H. PATIL, J]